SUPREME COURT OF THE UNITED STATES

COMMERCIAL NATIONAL BANK OF PORTLAND,
Plaintiff in Error,
vs.
HENRY WEINHARD,
Defendant.
No. 109.

COMMERCIAL NATIONAL BANK OF PORTLAND,
Plaintiff in Error,
vs.
GEORGE H. WILLIAMS,
Defendant.
No. 110.

Brief for Plaintiff in Error.

STATEMENT OF THE CASE.

The above-entitled cases have come to this Court by writs of error to the Supreme Court of the State of Oregon. The same questions arise in both and by stipulation they are to be heard together upon one brief. The federal jurisdiction obtains by reason of the necessary construction of various sections of the Revised Statutes of the United States constituting the National Bank Act. These suits, along with several others of like nature, were begun in the circuit court of the State of Oregon for Multnomah County to recover the value of certain shares of the Commercial National Bank of Portland, the plaintiff in error, and alleged to have been irregularly sold for an assessment.

By stipulation in the State court the two actions at Bar were tried as test cases, the residue to abide the result.

These suits arose under the following circumstances: Some years prior to 1896 the Commercial National Bank of Portland was organized under the National Bank Act to do business in Portland, Oregon. During the latter year it became known to the Comptroller of the Currency through reports of the bank officials and of the National Bank Examiners, that the capital stock of the Bank had become impaired to the extent of one-half its par value. Thereupon, on December 5, 1896, said Comptroller issued the following notice to the Bank:

"TREASURY DEPARTMENT.

Office of Comptroller of the Currency,

Washington, D. C., Dec. 5, 1896.

Whereas, it appears to the satisfaction of the comptroller of the currency that the capital stock of the Commercial National Bank, Portland, Oregon, has become impaired to an extent which makes necessary an assessment of two hundred and fifty thousand dollars ($250,000) upon the shareholders of said association to make good such deficiency:

Now, therefore, notice is hereby given to said association under the provisions of section 5205 of the Revised Statutes of the United States, to pay the said deficiency in its captital stock by assessment upon its shareholders, pro rata, for the amount of the capital stock held by each, and if such deficiency shall not be paid, and said Bank shall refuse to go into liquidation, as provided by law, for three months after this notice shall have been received by it, a receiver will be appointed to close up the business of the association, according to the provisions of section 5234 of the Revised Statutes of the United States.

In testimony whereof, I have hereunto subscribed my name and caused my seal of office to be affixed to these presents, at the Treasury Department, in the City of Washington, and District of Columbia, this 5th day of December, A. D. 1896.

JAMES H. ECKELS,

Comptroller of the Currency.

To the Commercial National Bank, Portland, Oregon."

Upon the receipt of this notice and on December 14, 1896, the Board of Directors of the Bank passed this resolution:

> "Resolved that in accordance with the notice served upon this association by the Comptroller of the Currency, under date of December 5, 1896, and received by this Bank on the 11th day of December, 1896, an assessment is hereby levied upon the shareholders of this Bank of 50 per cent or $50 per share payable at this bank on or before March 11, 1897.
>
> And resolved that the Cashier of this Bank be and he hereby is authorized and instructed to serve upon each shareholder of the Bank a legal notice of the above assessment, by sending such notice to each shareholder's address by registered mail."

On December 17th, 1896, the Cashier served a notice of said assessment upon the defendants in error and each of the other shareholders. Said defendants failed to pay this assessment and in consequence on March 18th, 1897, the Board of Directors, to satisfy the same, passed a resolution directing a sale of the delinquent stock to be made at public auction on May 5th, 1897, and on that day, and upon notice pursuant to the provisions of the statute, this stock was sold for the exact amount of such assessment.

At the time of said sale defendant Henry Weinhard was the owner of one hundred shares, and defendant George H. Williams of sixty shares of the capital stock.

The proceedings in connection with this assessment were taken under and pursuant to the directions of the Comptroller of the Currency; all the resolutions and notices were upon and according to forms prescribed and issued by said Comptroller and the assessment was levied and collected, under his direction, by the authority, and in the manner always pursued in such cases prior to that date and for some time subsequent thereto, and until the decision in *Hulitt vs. Bell*, 85 Fed. 98, hereinafter referred to.

More than two years after this assessment and on February 23, 1899, prompted presumably by this decision in

Hulitt vs. Bell, these suits were instituted to recover damages for a conversion of the stock growing out of said sale, the gravamen of each action being that the Board of Directors had no authority to make such assessment and sale because that power rested with the shareholders alone. The defendants in error recovered judgments in the Circuit Court of Oregon for the value of their stock at the time of sale, which was found to be $30 per share, which judgments were affirmed on appeal by the Supreme Court of that State and thereupon writs of error were applied for and allowed. For the purposes of this brief and to avoid confusion, the transcript of record wherein Henry Weinhard is defendant in error—being No. 109 upon the docket for the present term—will be used for reference.

SPECIFICATION OF ERRORS.

The substantial errors alleged to have been committed by the Supreme Court of Oregon are specified to be:

First: In overruling the demurrer to the complaint, when the cause of action stated therein was placed upon the sole ground that the Board of Directors of a National Bank had no power, under the direction of the Comptroller of the Currency, to levy an assessment or sell stock on account of the impairment of capital, such power being vested in the shareholders only;

Second; In sustaining the demurrer to the first, further and separate defense set up in the answer of the defendant in the State court, whereby said defendant pleaded the action of the Comptroller of the Currency finding an assessment to be necessary on account of the impairment of capital stock and the action of its Board of Directors pursuant thereto, and to the provisions of the Revised Statutes of the United States, which culminated in a sale of the stock in satisfaction of such assessment (*Record*, Answer, pp. 17-20);

Third: In sustaining the demurrer to the second, further and separate defense set up in the answer of defendant in the State court, pleading the action of the directors, under the instructions and approval of the Comptroller, in making the assessment and sale, and alleging that the shareholders should be estopped to complain thereof because of their failure to take steps to defeat the same (*Record*, Answer, pp. 20-26);

Fourth: In holding that the plaintiff in error wrongfully converted the shares of stock belonging to the defendants in error and awarding judgment accordingly (*Record*, Assignment of Errors, pp. 6, 7).

Perhaps a sufficient specification of the errors relied on in this court is expressed in the contention that the judgment of the Supreme Court of Oregon is erroneous because it is based upon the false assumption that under the United States Revised Statutes relating to National Banks, the shareholders alone are empowered to levy assessments to make good an impairment of capital stock and that any such assessment made by a Board of Directors, or sale pursuant thereto, is invalid; also because the shareholders stood by and failed to take any steps to put the association into liquidation, as they might have done, and are therefore estopped to complain of the action taken by the directors.

ARGUMENT.

As the decision of these cases turns upon a correct interpretation of section 5205 of the United States Revised Statutes, read in connection with the other provisions of the National Bank Act—sections 5133 to 5244, with amendments—the law on this subject, in its entire scope and purpose, will be briefly considered before taking up this particular section.

The purpose of Congress in enacting this law was to provide a complete banking system for the United States. In

meeting the demands arising from the commercial relations of each State and between the several States, it was considered requisite that a National Bank Note should pass current everywhere, and to that end the credit of the nation is pledged for its payment. The provisions of the act to insure the safety of depositors and other creditors show a keen exercise of human foresight. Among these may be mentioned: (a) The entire original capital must be paid in, section 5140; (b) An adequate reserve must be maintained, section 5191; (c) The liabilities of any one person to the Bank must not exceed one-tenth of the capital actually paid in, section 5200; (d) Loans are not permitted to be secured by the capital stock, section 5201; (e) A limitation is put upon the indebtedness which the Bank may create (except to depositors and for its notes, etc.) which is measured by the amount of its capital stock actually paid in and *undiminished* by losses or otherwise, section 5202; (f) A prohibition against borrowing money upon the pledge of its notes or circulation, section 5203; (g) Its capital stock is required to be kept intact, and if losses occur, they must be made good before dividends can be paid, section 5204; (h) Each shareholder is made responsible for the debts of the association to the extent of the par value of his stock, *in addition to the amount invested therein*, section 5151.

The general business and management of a National Bank which is defined by the act to be a "body corporate" is intrusted to its Board of Directors. (*First Nat. Bank vs. Nat. Exchange Bank*, 92 U. S. 122-127.) Section 5136 provides that it shall have power:

> "*Sixth.* To prescribe, by its Board of Directors, by-laws not inconsistent with law, regulating the manner in which its stock shall be transferred, its directors elected or appointed, its officers appointed, its property transferred, its general business conducted, and the privileges granted to it by law exercised and enjoyed.

"*Seventh.* To exercise, by its Board of Directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this title."

And, again, by section 5145, it is declared that the "affairs" of the corporation "shall be managed by not less than five directors," which is equivalent to prescribing that within the powers of the corporation, except as expressly modified by the Act under which its charter is held, the Board of Directors is entrusted generally with the management of the business and affairs of the Bank, and their acts, done in good faith, cannot be called in question.

Dana vs. Bank of U. S., 5 Watts & Serg. 223, 246;
Hutchinson vs. Green, 91 Mo. 367, 375.

A clear statement of the relations borne by the directors and stockholders, respectively, to a corporation is to be found in the case of

Beveridge vs. N. Y. E. R. Co., 112 N. Y. 1,

wherein the Court, speaking by Gray, J., uses this language, at pages 22 and 23:

"All powers directly conferred by statute, or impliedly granted, of necessity, must be exercised by the directors who are constituted by the law as the agency for the doing of corporate acts. The expression of the corporate will, and the performance of corporate functions, in the management of a corporation, may originate with its directors, where the law or the by-laws have not expressly restricted their authority and made their action to rest for its validity upon the concurrence of the stockholders, by previous action or subsequent ratifica-

tion. Within the chartered authority, they have the fullest power to regulate the concerns of a corporation, according to their best judgment, and contracts, which the corporation could legitimately make, come within the scope of the ordinary powers of corporate management. (*Leslie vs. Lorillard*, 110 N. Y. 536.) The duties of directors are of the most responsible kind, and it is in the purview of the law that they should be held to a full accountability for their acts to the stockholders, towards whom they occupy the relation of trustees, with all which that term implies of power and responsibility. In the management of the affairs of the corporation, they are dependent solely upon their own knowledge of its business, and their own judgment as to what its interests require. The error, in the supposition that, in the case of a railroad corporation, a lease of the railroad property requires for its validity the authorization of stockholders, has its source in the idea that such an act involves an organic change, which either the law inhibits or, if it permits, vests the power to make only in the corporators, either by express enactment, or by necessary or natural implication. If such a contract, as the lease by a railroad corporation to another of its railway, was not within the powers expressly conferred by general laws, by which, as by the charter, the corporate powers are measured, it would be *ultra vires*, and could not be made at all. But, as the act of 1839 authorizes the making of such a contract, and the law does not regulate the manner of making it, or impose restrictions with respect to it, I think it must logically follow that the power to make it is, like all other general powers of management, lodged in the directors. They must exercise all the powers of a corporation, subject to the general law and to the by-laws of the company, and, where they act in good faith and without fraud or collusion, their action is conclusive upon the corporation. As agents of the corporation, we must find the extent of their powers by an examination of the laws under which it was created and exists. Those laws, in defining the powers of the corporation, define the scope of the directors' powers to act for it. Judge Comstock, in *Hoyt*

vs. Thomson's Executor, (19 N. Y. 216), said: 'The board of directors of a corporation do not stand in the same relation to the corporate body which a private agent holds towards his principal. In the strict relation of principal and agent, all the authority of the latter is derived by delegation from the former. . . . . But in corporate bodies the powers of the board of directors are, in a very important sense, original and undelegated. The stockholders do not confer, nor can they revoke, those powers. They are derivative only in the sense of being received from the state in the act of incorporation. The directors convened as a board are the primary possessors of all the powers which the charter confers."

By section 5147 each director is required to take an oath to diligently and honestly administer the "affairs" of the association so far as the duty devolves upon him.

In looking at the exceptions to the exercise of the power of management by the directors, and wherein it is expressly provided that the consent of the shareholders shall be necessary to the performance of certain acts by the association, it becomes apparent that whenever it is intended by the Bank Act that the powers of a corporation formed thereunder are to be directed or controlled by the shareholders, the word "shareholder" is specifically used in that connection. The following instances may be enumerated: Section 5149, relating to the election of directors, provides that shareholders representing two-thirds of the stock may fix the day therefor, if the directors fail so to do. The act of Congress approved July 12, 1882—22 *Stat. L.*, p. 162—provides for an extension of the corporate existence "by the consent in writing of shareholders owning not less than two-thirds of the capital stock." Section 5220 requires the vote of shareholders owning two-thirds of the capital stock in order to go into liquidation. Section 5143 makes a like vote of the shareholders necessary to effect a reduction of the capital stock. Section 5142, as amended by section 1 of the act ap-

proved May 1, 1886, requires a similar vote of the shareholders to increase the capital stock. Particular attention is called to the circumstance that prior to this act of 1886 section 5142 had always been construed to authorize an increase of the capital stock by the directors, though not so expressly declaring, if the original articles of association provided that it might be increased to a specified maximum, the time and extent of such increase being confided to their discretion. It will be noted that by the amendment of 1886, the clause primarily in section 5142, providing that an increase of stock might be anticipated through the articles of association, was eliminated, thus leaving this and section 5143 upon a parity in all respects, so far as shareholders were concerned. Section 2 of the act of May 1, 1886, also requires a like vote of the shareholders in order to change the name of the bank, or its place of business. By section 5154 a State bank is permitted to become a national association when the change is authorized by the owners of two-thirds of its capital stock.

These references show that whenever a power is to be exercised under the act which would alter the contract of membership which the shareholders originally entered into, or change the fundamental purpose of the corporation, the policy of the law is to delegate the control or direction of that power to the shareholders; but it does not pretend to give them any general powers in the management of the corporation.

Again, it is apparent from a reading of the Bank Act that wherever a vote of the holders of stock is provided for, except in fixing a day of election, the shareholders cannot themselves perform the acts regarding which their votes are to be taken. Their authority is limited to creating a condition precedent, and thereupon all subsequent and ministerial or executive action rests with the directors. The

shareholders vote to increase the capital stock, and having done so, their authority ends. They cannot actually issue stock or take any further steps, for all this must be done by the directors. So, in case of the decrease of capital, or liquidation, or any other instance where a vote of the shareholders is provided for.

The law points out when the shareholders may act, and leaves all else to the directors; the manifest intent being to leave nothing to conjecture in that regard.

This enumeration of the instances in which the shareholders may take part in the conduct of a national bank, establishes the line between them and the directors, the latter, with these exceptions, being expressly authorized to manage the "affairs" of the association; to exercise its powers. Why enumerate the instances in which the shareholders shall take part, unless they are to be exclusive of all others? Could it be claimed that under section 5142, as originally enacted, any vote of the shareholders became necessary to authorize the directors to increase the capital stock to the maximum permitted by the articles of association? If so, why was the section afterwards amended so as to make the consent of such shareholders a condition precedent to such increase? And if it were not contemplated by the original section to leave this discretion to the directors, why did the succeeding section 5143 at all times expressly provide in contradistinction to the other, that no decrease of the capital stock should be made without the consent of two-thirds of the shareholders? The conclusion would seem to be irresistible that the framers of the law originally intended to leave any increase of the capital stock authorized by the articles of association to the discretion of the directors and to make a decrease thereof dependent upon the consent of the shareholders. Afterwards, by amendment to 5142, their consent became equally necessary in both instances.

The directors and shareholders, respectively, derive their authority from the act and neither can extend or diminish the powers of the other.

Section 5205 reads as follows:

> "Every association which shall have failed to pay up its capital stock, as required by law, and every association whose capital stock shall have become impaired by losses, or otherwise, shall, within three months after receiving notice thereof from the Comptroller of the Currency, pay the deficiency in the capital stock, by assessment upon the shareholders pro rata for the amount of capital stock held by each; and the Treasurer of the United States shall withhold the interest upon all bonds held by him in trust for any such association, upon notification from the Comptroller of the Currency, until otherwise notified by him. If any such association shall fail to pay up its capital stock, and shall refuse to go into liquidation, as provided by law, for three months after receiving notice from the Comptroller, a receiver may be appointed to close up the business of the association, according to the provisions of section fifty-two hundred and thirty-four. [*And provided*, That if any shareholder or shareholders of such bank shall neglect or refuse, after three months' notice, to pay the assessment; as provided in this section; it shall be the duty of the board of directors to cause a sufficient amount of the capital stock of such shareholder or shareholders to be sold at public auction (after thirty days' notice shall be given by posting such notice of sale in the office of the bank, and by publishing such notice in a newspaper of the city or town in which the bank is located, or in a newspaper published nearest thereto), to make good the deficiency; and the balance, if any, shall be returned to such delinquent shareholder or shareholders.]

The various provisions of the Bank Act constitute an essential part of the contract entered into by the shareholder when subscribing for his stock. One of the most important features of the act is disclosed in its provisions, already

noticed, for maintaining the stock at par. By section 5199, the payment of dividends is prohibited, except from the net profits; and before the declaration of a dividend, one-tenth of such profits for the preceding half year must be carried to its surplus fund until the same shall amount to twenty per cent of the capital stock. All these precautions for the creditors are reinforced by the provisions of section 5204 prohibiting the withdrawal of any capital, or the making of dividends if, from any cause, losses have been sustained equal to the undivided profits then on hand; also by section 5202 inhibiting the Bank from becoming indebted in a sum exceeding the capital stock then actually paid in and remaining *undiminished* by losses or otherwise. This section shows it was contemplated that the capital might become diminished, and of this the shareholder was put upon notice. It may be also remarked that section 5205 mentions impairment of the capital by "losses or otherwise," using the same words which appear in 5202.

The shareholder in a national bank, by entering into that relation, subjects himself to all the obligations created by the statute.

Studebaker vs. Perry, 184 U. S. 258-261.

The Directors are as much bound to maintain the capital of the Bank unimpaired, as to perform any other duty with which they are charged by the act. The shares became liable to be assessed when they were subscribed for, and the shareholders were not only charged with notice of that fact, but they assumed this liability. The payment of an assessment to make up impaired capital is not in the nature of a further investment in the capital stock by the shareholder. His holding of stock remains the same, but has thereby cost him a greater amount; not that the investment is actually greater, in contemplation of law, than before payment, but because a part of the original investment has

disappeared, and under his contract with the association the shares are to remain fully paid up. As a shareholder he becomes subject to this liability until legally relieved therefrom.

Earle vs. Carson, 188 U. S. 42-51.

The levy of an assessment is merely to call in and restore to the active business of the Bank sufficient to repair the fund which was created when the association was organized, for the purpose of maintaining that fund in its entirety in order that the business of the Bank may continue. It was not in any degree equivalent to creating new capital stock because the number of shares of the corporation, the par value thereof, the holders and their relative positions and influence were not altered thereby. The holder of one hundred shares of the capital stock had just as much influence in voting, as compared with the total number of shares, after the payment of the assessment as he did before. He had simply replaced a portion of his share of the common investment which had been diminished by reason of losses.

By section 5139, it is declared that no change shall be made in the articles of association by which the rights, remedies, or security of the existing creditors shall be impaired. It is the policy and intent of the act that creditors shall at all times be secured to the extent of the full capital, and also by the liability of the shareholders for an equal amount (section 5151.) The capital must not be less than the law requires (section 5138.) By section 5141, if, through a delinquent sale, or otherwise, the stock of the association shall become reduced below the minimum of capital, it must, within thirty days thereafter be increased to the requisite amount, or a receiver will be appointed. By section 5191 a lawful money reserve is also required to be kept by national banks, in an amount varying from fifteen to twenty-five per cent of the aggregate of their notes and deposits, ac-

cording to locality. The capital stock is the primary source from which the creditors of the Bank derive their security, and it is for their protection that the law provides for this capital and for its maintenance against losses and impairments. The words "in addition to the amount invested in such shares" occurring in section 5151, imply that a shareholder may be called on to make good any diminution of the par value of his stock, and that he cannot escape liability to creditors equal to that par value, although he may have paid in a greater amount than the face of his shares.

The condition precedent upon which the acts of the directors under consideration were founded was the fact of the impairment of the capital stock of the Bank *as determined and declared by the Comptroller of the Currency.* No vote of the shareholders was necessary to establish this impairment; it was a question wholly within the jurisdiction of the Comptroller, and when decided by him it furnished the foundation for the assessment. His notice to the bank was conclusive of this fact, and thereupon the collection of this assessment became a *duty*, purely ministerial and executive, which devolved upon the directors who had no discretion in the premises. It was the *law* which made this assessment necessary and not the vote of the directors, who were simply obeying the express provisions of that law. It will be noted that the language of this section is mandatory; it provides that the Bank "shall" meet a deficiency in the capital stock by assessment. It will be further noted that the assessment so provided for may be not only for the purpose of restoring an impairment of capital stock, but also to pay up an *original subscription* pursuant to section 5140. *The two contingencies are classed together.* As to this original subscription, the liability to pay is unquestionably created by law without the action of the stockholders or directors; an impairment of capital is by section 5205 placed upon the same footing, which section also provides that if any shareholder shall

neglect or refuse to pay the assessment as therein required, it shall be the duty of the directors to cause his stock to be sold to make good the deficiency; in the same way the directors are empowered by section 5141 to sell the stock of a shareholder who has failed to meet any original installment required to be paid thereon. *The procedure is the same in both cases.* Again, section 5205, after making it mandatory to repair the capital, imposes a penalty if the association shall "fail" to pay up its capital stock. The use of this word "fail" would seem to be inappropriate if the restoration of capital were a matter dependent upon a vote of the shareholders to levy an assessment for that purpose. The law provides a remedy in case of failure to pay up, which imports that the makers of such law contemplated that an assessment would follow a notice from the Comptroller as a matter of course. And herein lies the vice of the contention by the defendants in error that the shareholders were entitled to determine whether this assessment should be levied as the alternative to liquidation, or the appointment of a receiver; which contention involves a substitution of the minor for the major proposition. It reverses the whole machinery of the act. *The Bank was formed to exist and do business pursuant to the policy of the act, and not to liquidate or go into the hands of a receiver.* Liquidation is only a contingency which the shareholders may take advantage of in case the enterprise proves unsatisfactory. In order for the Bank to accomplish its legitimate purpose, it was bound to discharge certain obligations if they arose under the provisions which have been already pointed out. The act contemplates that the capital of a Bank may become impaired, and it is the policy of the law to have that deficiency made up. The act also expressly contemplates the continuance of business by a bank when its reserve has been impaired.

Earle vs. Carson, 188 U. S. 42-45.

The same rule should obtain in case of an impaired capital. To repair capital is not to change the fundamental, organic character of the corporation or to alter the relations existing between the shareholders, and it is only in such cases that the general law confers a right upon the shareholders to act. The levy of this assessment was not a change in the purpose of the corporation, but was in furtherance thereof, and therein lies the distinction between these cases and *Railway Co. vs. Allerton*, 18 Wall. 233. Suppose the impairment in the capital of the plaintiff in error had been but two or five per cent. To replace this by an assessment could not certainly be claimed to work a change in the fundamental character of the association. As before pointed out, the impairment might have been a portion of the *original capital* which had not been paid up, and was called for by assessment under section 5205. The levy of this assessment effected no such radical change in the management as an assignment of the property of the corporation for the benefit of creditors, which the directors might unquestionably make.

Hutchinson vs. Green, 91 Mo. 375;
De Camp vs. Alward, 52 Ind, 468-473.

The levy of assessments to meet the requirements of corporations engaged in various enterprises is a matter of such common occurrence as to require no enumeration or elaboration. Under the general rule of decision at this day these assessments, when authorized by the charter or the law under which the corporation is created, are made by the directors, although they may not be specially empowered to to do so by the statute creating such corporation. This is undoubtedly so as to calls for unpaid capital.

Hatch vs. Dana, 101 U. S. 205-214;
The Ambergate etc. Ry. Co. vs. Mitchell, 4 Exch. 540, 542;
(Also cited as *Ry. Co. vs. Mitchell.*)
Cook on Stock & Stockholders, § 109.

The same rule should apply to the assessment in these cases, as both calls and assessments are classed together in section 5205. The terms are often used interchangeably.

***Budd vs. Multnomah St. Ry. Co.*, 15 Or. 413, 416;**

***Penobscot R. Co. vs. Dummer*, 40 Me. 172;**

2 *Private Corporations* (Clark & Marshall), § 497, (p. 1524).

A great advance has taken place in this respect since the decision in *Ex parte Winsor*, 3 Story, 411, and *Marlborough Mfg. Co. vs. Smith*, 2 Conn. 579, relied on by the other side.

Corporations are no longer hampered, in the transaction of business, by the ancient rules governing such bodies, which were founded upon the theory that because created without the organs of speech, they might only express their will in writing, under corporate seal, and could not promise or accept a deed in any other manner, nor take by livery of seisin, or commit a tort, or do various other things.

Under section 5220 the Bank might go into liquidation by a vote of the shareholders representing two-thirds of its stock. This was their remedy if they chose to pursue it, and this was one of the contingencies which might defeat the assessment, and so it was provided against by section 5205. Dissolution was a consequence to follow a failure to repair the capital, as the appointment of a receiver under section 5234 is the penalty for violating sections 5226 and 5227. Will it be claimed that the shareholders have a right to vote upon the question of violating those sections? If a national bank should fail to redeem its notes as required by section 5226, the penalty would be a receiver, but it could scarcely be contended that such failure must result from a vote of the shareholders; and no more so a failure to maintain its reserve under section 5191, which may also provoke the appointment of a receiver.

By the first clause of section 5205 it becomes the duty of the association to make good any failure to pay up its original capital, or any impairment of that capital, by an assessment of the shareholders within three months after notice from the Comptroller. *This is to be done in the regular course of business during its corporate life.* Suppose that but eighty per cent of the original capital of this bank had been paid in when the Comptroller issued his notice; then the remaining twenty per cent would be included in the assessment, and this twenty per cent might have been the full amount needed to repair the capital. If the shareholders had a voice to determine whether such a residue of capital should be called in under section 5205, then they equally had a right to decide upon the payment of *any* installment under section 5140, and which they could only defeat by voting to go into liquidation; but it would certainly not be contended that no such installment could be called in under section 5140, nor any sale of stock made under section 5141, in case of failure to pay up, unless the shareholders were first afforded an opportunity to vote whether such action should be taken. The policy of the act would equally be defeated in both cases under such a construction.

By the express terms of section 5220 a vote of shareholders *owning two-thirds of the stock* is a condition precedent to liquidation. If the action of the shareholders were necessary to levy an assessment under section 5205, the question might be decided by a *majority vote merely* at their meeting, under the general rule in such cases, there being no special provision in the act on the subject. A bare majority might decide against the assessment and so force the association to dissolution and a receiver by *indirection*, when the act contemplates that such a result can only be effected by a vote of two-thirds of the stock. Except in the election of directors, a vote of the holders of two-thirds of *all* the shares is requisite under the Bank Act to the exercise of any power

expressly delegated to the shareholders; but under the theory of the other side, a majority vote at a meeting of shareholders representing a bare majority of the stock could defeat an assessment under section 5205 and force the corporation to a dissolution. Instead of liquidation being accomplished by a direct vote of two-thirds of the stock, under section 5220, it would thus be indirectly brought about by the naked majority of a quorum competent to transact business. The courts will not construe a statute in such manner as to defeat principles of sound public policy, nor against the obvious intention of its makers. By section 5136 of the act a body corporate formed thereunder is to exist for twenty years, "unless it is sooner dissolved according to the provisions of its articles of association, *or by the act of its shareholders owning two-thirds of its stock*, or unless its franchise becomes forfeited by some violation of law." No mention is made in this enumeration of causes which work a dissolution, of such a further contingency arising if *a majority of the shareholders have voted against an assessment to restore a capital impaired*, and none such seems to have been contemplated. The law gives the directors no discretion to decide whether the bank shall continue or liquidate, *but it is their duty to keep the Bank going until the holders of two-thirds of the stock vote otherwise;* the levying of an assessment is not a discretionary act on their part, if an impairment of capital has been declared by the Comptroller to exist, and the statute creates no presumption of inability to continue business on account of such impairment no more than if the reserve had been reduced below the legal requirement.

Earle vs. Carson, 188 U. S. 45.

If a national bank were notified by the Comptroller that it was violating the law in making excessive loans or purchasing its own stock, or lending money on real estate, it must repair the error or the penalty will be a receivership. The directors

managing the Bank must comply with the law or the Comptroller will enforce it, but in no sense can the avoiding of that penalty be said to be an exercise of discretion confided to the association. So, failure to comply with the notice to make good an impairment of capital will be followed by a receivership, but to make good that impairment is not an exercise of discretion but a proper compliance with the provisions of the law which require the stock to be maintained at par. It is the position of the other side that a notice from the Comptroller to make good impaired capital is a demand on the association to exercise its discretion in assessing or submitting to a receivership, but this is no more an exercise of discretion than if the Bank were forced into the hands of a receiver under section 5191 or 5208 or 5201, or any other provision of the act where the appointment of a receiver may be the consequence of failing to keep its requirements. In short, receivership is the *penalty* for a failure to comply with the directions of the act, but it cannot be said to be an alternative course properly open to the corporation as a matter of choice. It is conceded, however, that the way is open at all times to the shareholders to put the association into liquidation under section 5220; but that can only be effected by a vote of two-thirds of all the shares. With this single exception, the Bank is to continue in business until the termination of its life under the Bank Act, or any extension thereof; it is the duty of the directors to carry on the Bank and comply with the law in every respect. *They have no discretion to violate it.*

There was no snap judgment upon the shareholders in the proceedings under consideration. By section 5205 they were given three months after notice in which to pay the assessment, and no sale could be made until thirty days thereafter. If they desired a dissolution of the Bank, it only became necessary for them to have a meeting called for that purpose

and secure a favorable vote from the owners of two-thirds of the stock. *In default of such action on their part it was the clear purpose and policy of the law that the Bank should continue in business with its capital restored.* The shareholders cannot lie by and fail to act, and then take advantage of such failure by claiming that their shares have been converted, and so practically obtain a disposal of such shares through their own negligence. It would not be just to permit them to allege injury under such circumstances, and they should be estopped to do so. If these judgments are affirmed, it must necessarily follow that the parties who bought in this stock and paid $50.00 a share therefor, are put in a worse position than they who permitted it to be sold and voluntarily neglected to avail themselves of the right to put the Bank into liquidation.

In levying this assessment and making the sale, the directors acted under the instructions of the Comptroller and used the blanks furnished by that official pursuant to the established and unbroken practice of his office to that time. Under his interpretation of the statute it was held to be the duty of the directors to levy assessments under section 5205. and this procedure always obtained until after the decision in *Hulitt vs. Bell*, ante.

The construction given to a statute by those charged with its execution, though not controlling, is entitled to the highest consideration of this court and will not be overruled without cogent reasons.

U. S. vs. Moore, 95 U. S. 760, 763;
Hastings etc. R. R. Co. vs. Whitney, 132 U. S. 357, 366.

In case of ambiguity, contemporaneous and uniform executive construction is regarded as decisive.

Brown vs. U. S., 113 U. S. 568, 571.

This Court will take judicial notice of the rules and regulations prevailing in the office of the Comptroller of the Currency and the acts of that official.

Caha vs. United States, 152 U. S. 211, 222;
Keyser vs. Hitz, 133 U. S. 138, 146;
Jones vs. United States, 137 U. S. 202;
Heath vs. Wallace, 138 U. S. 573, 584.

The decision of the Supreme Court of Oregon is based upon expressions occurring in *Hulitt vs. Bell*, 85 Fed. 98, and *Delano vs. Butler*, 118 U. S. 634, all of which are recognized to be *dicta*. It is urged, with all due respect, that the Oregon Supreme Court—following *Hulitt vs. Bell*—committed the error of permitting its judgment to turn upon considerations of convenience rather than a correct interpretation of the provisions of the Bank Act. The Court (Record, pp. 50, 51) assumes that there is no legal obligation on the part of the shareholders to pay an assessment levied under section 5205, unless it is voluntarily authorized by them, ignoring the fact that the shareholders by their subscriptions to the stock became liable, if called on, to pay any such assessment, under the direction of the Comptroller, or submit to a sale of their stock for its satisfaction; also ignoring the further fact that the way open for the shareholders to defeat this assessment was not to vote against it, but by voting to have the association go into liquidation. When the Court, speaking of the contingency of an assessment, and the right of the shareholders to determine the course to be pursued touching its levy and collection, uses this language: "And we think that the law contemplates that this right shall be exercised by them alone," it fails to discuss or expound the intent and purpose of Congress in providing certain instances in which the shareholders shall act, or to point out why those instances should not be exclusive of all others.

As a general proposition, the powers of stockholders are more restricted than those of directors. They cannot, either separately or collectively, contract for the corporation nor make a sale or mortgage of corporate property.

Smith vs. Hurd, 12 Met. 371, 385;
Humphreys vs. McKissock, 140 U. S. 304, 312;
Gashwiler vs. Willis, 33 Cal. 11, 19;
Blood vs. Water Co., 113 Cal. 221;
Allemong vs. Simmons, 124 Ind. 199.

The Court also commits the error of assuming that because the shareholders have the means to avert an assessment by putting the Bank into liquidation through a vote *of two-thirds of the stock*, this circumstance gives them the right to exercise the function of the directors, and decide, in the first instance, perhaps by a mere majority vote, whether an assessment shall be levied. It would seem to have been the manifest purpose of Congress to avoid the possibility of a question arising between the directors and shareholders as to the exercise of authority, by expressly mentioning every contingency in which the latter could have a voice in the management of a national bank. Courts cannot engraft on the law exceptions or limitations. Why enumerate these contingencies if they were not to be exclusive of all others, and why afterwards amend the act in two or more instances so as to extend this right of the shareholders to cases not originally provided for, if the question as to when that right should properly be exercised were to be left, after all, to the determination of the courts? The learned judge who wrote the opinion in *Hulitt vs. Bell* assigns as one reason for his conclusion that the shareholders, rather than the directors, are empowered to make an assessment, the circumstance that as to the latter "their holdings of the capital stock may be but a small proportion of the entire amount. They ought not to exercise control over a matter

so vital, unless the statute gives it to them in unmistakable terms." This language is quoted with approval by the Oregon Supreme Court. But both courts seem to overlook the fact that the Bank Act not only requires that the directors shall diligently and honestly discharge their sworn duties, but also provides severe penalties in case of a failure to comply with this obligation. These courts also fail to notice the fact that directors are annually elected by the shareholders, and such selection is presumably made advisedly and on account of their peculiar fitness for the position.

Hulitt vs. Bell is not authority upon the question under discussion because it was not essential to the decision in that case, as the suit was dismissed upon another ground. It is stated in the opinion by Judge Sage that upon this question no direct authority had been cited. It was a matter of first impression. *Delano vs. Butler*, 118 U. S. is referred to. That case arose out of the failure in 1882 of the Pacific National Bank of Boston. An assessment, under section 5205 of the Bank Act had been voted by the shareholders at their annual meeting, and had been paid in by most of them. *No question as to the validity of that assessment was involved;* it was an action to collect a subsequent assessment levied by the Comptroller of the Currency under section 5151. With reference to the prior assessment under section 5205 this Court, speaking by Mr. Justice Matthews, said that it was a *voluntary* assessment made by the shareholders upon themselves for the purpose of continuing the business of the Bank, and was not a bar to a further assessment by the Comptroller under section 5151 for the purpose of paying the creditors of the corporation, pro rata, and winding up the concern. No consideration of section 5205, upon the point involved here was attempted, nor was it necessary; and while some language may be found in the opinion which appears favorable to the other side, it is in no manner conclusive upon this

point. It does not relieve the Court from a consideration of the proposition, *de novo*.

The decision of the Supreme Court of Oregon rests upon what that Court is pleased to denominate a "judicial dictum" by Judge Sage in *Hulitt vs. Bell*, fortified by some general expressions by Mr. Justice Matthews in *Delano vs. Butler*, not pertinent to a decision of that case, and the broad proposition that shareholders should be consulted before being afflicted by assessments; but the learned Court utterly fails to consider the effect of inclusion and exclusion of powers, as applied to the Bank Act.

Respectfully submitted,

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